

Wage and Hour Division, Labor

§ 779.405

EXECUTIVE, ADMINISTRATIVE, AND PROFESSIONAL EMPLOYEES AND OUTSIDE SALESMEN

§ 779.401 Statutory provision.

Section 13(a)(1) of the Act provides that the provisions of sections 6 and 7 shall not apply with respect to:

Any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities).

§ 779.402 "Executive" and "administrative" employees defined.

The terms "executive" and "administrative" as used in section 13(a)(1) of the Act are defined and delimited in subpart A of part 541 of this chapter and explained in subpart B of that part. These regulations are applicable under the amended section 13(a)(1) in determining which employees are bona fide executive or administrative employees. The clause that is enclosed in parentheses in section 13(a)(1) and which reads "including any employee employed in the capacity of academic administrative personnel for teacher in elementary or secondary schools" was added by the 1966 amendments to the Act. This clause will not have any affect in the application of the regulations to retail or service establishments. The Act and the regulations point out the fact that an executive or administrative employee of a retail or service establishment may devote up to 40 percent of his hours worked in a workweek to activities which are not directly and closely related to the performance of executive or administrative activities and still qualify as a bona fide executive or administrative employee. However, in other types of

establishments such a tolerance is limited to 20 percent, except where special provisions are made in part 541 of this chapter.

§ 779.403 Administrative and executive employees in covered enterprises employed in other than retail or service establishments.

The up-to-40 percent tolerance for nonexecutive or nonadministrative duties discussed in the preceding section, does not apply to executive or administrative employees of an establishment other than a "retail or service establishment." For example, an executive or administrative employee of a central office or a central warehouse of a chain store system is not an employee of a "retail or service establishment," and therefore must still devote not more than 20 percent of his hours worked in a workweek to activities which are not directly and closely related to the performance of executive or administrative duties in order to qualify as a bona fide executive or administrative employee under section 13(a)(1), except where special provisions are made in the regulations issued under that section of the Act.

§ 779.404 Other section 13(a)(1) employees employed in covered enterprises.

The "professional" employee or the "outside salesman" employed by a retail or service establishment in a covered enterprise, in order to qualify as a bona fide "professional employee" or as an "outside salesman," must meet all the requirements set forth in the regulations issued and found in part 541, subpart A of this chapter, and further explained in subpart B thereof. The up-to-40 percent tolerance discussed in § 779.403 for "administrative and executive employees" of a retail or service establishment does not apply to the "professional employee" or the "outside salesman."

STUDENTS, LEARNERS, AND
HANDICAPPED WORKERS

§ 779.405 Statutory provisions.

Section 13(a)(7) of the Act provides that the provisions of sections 6 and 7 shall not apply to:

Any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 14.

Section 14 of the Act provides, in pertinent part, as follows:

LEARNERS, APPRENTICES, STUDENTS, AND
HANDICAPPED WORKERS

SEC. 14. (a) The Secretary of Labor, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe.

(b) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment of full-time students, regardless of age but in compliance with applicable child labor laws, on a part-time basis in retail or service establishments (not to exceed twenty hours in any workweek) or on a part-time or a full-time basis in such establishments during school vacations, under special certificates issued pursuant to regulations of the Secretary, at a wage rate not less than 85 per centum of the minimum wage applicable under section 6, except that the proportion of student hours of employment to total hours of employment of all employees in any establishment may not exceed (1) such proportion for the corresponding month of the 12-month period preceding May 1, 1961, (2) in the case of a retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) are covered by this Act for the first time on or after the effective date of the Fair Labor Standards Amendments of 1966, such proportion for the corresponding month of the 12-month period immediately prior to such date, or (3) in the case of a retail or service establishment coming into existence after May 1, 1961, or a retail or service establishment for which records of student hours worked are not available, a proportion of student hours of employment to total hours of employment of all employees based on the practice during the 12-month period preceding May 1, 1961, in (A) similar establishments of the same employer in the same general metropolitan area in which the new establishment is located, (B) similar establishments of the same employer in the same or nearby counties if the new establishment is not in a metropolitan area, or (C) other establishments of the same general character

operating in the community or the nearest comparable community. Before the Secretary may issue a certificate under this subsection he must find that such employment will not create a substantial probability of reducing the full-time employment opportunities of persons other than those employed under this subsection.

* * * * *

(d)(1) Except as otherwise provided in paragraphs (2) and (3) of this subsection, the Secretary of Labor, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment under special certificates of individuals * * * whose earning or productive capacity is impaired by age or physical or mental deficiency or injury, at wages which are lower than the minimum wage applicable under section 6 of this Act but not less than 50 per centum of such wage and which are commensurate with those paid nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work.

(2) The Secretary, pursuant to such regulations as he shall prescribe and upon certification of the State agency administering or supervising the administration of vocational rehabilitation services, may issue special certificates for the employment of—

(A) handicapped workers engaged in work which is incidental to training or evaluation programs, and

(B) multihandicapped individuals and other individuals whose earning capacity is so severely impaired that they are unable to engage in competitive employment,

at wages which are less than those required by this subsection and which are related to the worker's productivity.

(3)(A) The Secretary may by regulation or order provide for the employment of handicapped clients in work activities centers under special certificates at wages which are less than the minimums applicable under section 6 of this Act or prescribed by paragraph (1) of this subsection and which constitute equitable compensation for such clients in work activities centers.

(B) For purposes of this section, the term "work activities centers" shall mean centers planned and designed exclusively to provide therapeutic activities for handicapped clients whose physical or mental impairment is so severe as to make their productive capacity inconsequential.

§ 779.406 "Student-learners".

(a) *Applicable regulations.* In accordance with section 14 of the Act regulations have been issued to provide for employment under special certificates of student-learners at wages lower than